



DEPARTMENT OF JUSTICE

Remarks at the Public Workshop on Competition in Labor Markets

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Good morning and welcome to the Robert F. Kennedy Main Justice Building. I am so pleased to open today's workshop on competition in labor markets.

This workshop has been a long time in the making. Late last year, we set out to facilitate a conversation between labor and IO economists, antitrust practitioners, academics, and policymakers for a multi-dimensional discussion about the role of antitrust enforcement in labor markets. By hearing from experts who focus on different aspects of worker welfare, the Division could obtain a more nuanced understanding of the marketplace for the employment services of the American worker, and for the role of antitrust enforcement therein.

I supported that effort wholeheartedly, and I am thrilled to see that vision realized today. I would like to thank Doha Mekki, one of our front office Counsel to the Assistant Attorney General, for her leadership in organizing today's workshop. Doha's passion for the areas of labor and antitrust are second to none, and without her hard work we would not have such an impressive array of speakers here today.

Thank you to our exceptional participants and their respective organizations for agreeing to participate in this program. Indeed, the value of today's panels and presentations is two-fold. First, it will help inform our competition enforcement and advocacy in this area. Second, thoughtful discussion between people with wide-ranging viewpoints, experiences, and areas of expertise is an essential public good. It is the bedrock of our democracy and a hallmark of an open society.

I thank you for being with us today and I look forward to hearing your perspectives.

That antitrust law applies to labor markets is at once a powerful statement -- and an admittedly dispassionate one.

Broadly speaking, there is something special about work. People are the very objects of the law's solicitude and, for many Americans, one's labor is essential to his or her sense of dignity. Labor is both a unit with economic value and an expression of identity or values.

This reminds me of a story I read in a speech by former Attorney General Robert Jackson. In 1942, shortly after he became an Associate Justice of the Supreme Court, Jackson recounted a parable about three stonecutters who were asked to describe their work. The first stonecutter focuses on how the job benefits him. He says, "I am earning a living." The second narrowly describes his personal task: "I am cutting stone." The third man lights up as he explains what the work means to others: "I am helping to build a cathedral."¹

Other great Americans also attached personal values to labor. For example, in 1859, Abraham Lincoln gave an address before the Wisconsin State Agricultural Society in which he famously said, "Labor is prior to and independent of capital."

¹ Justice Robert H. Jackson, *Advocacy Before the United States Supreme Court, Address Delivered upon the Morrison Lecture Foundation Before the California State Bar* (Aug. 23, 1951), *in* 37 CORNELL L.Q. 1, 16 (1951).

Of course, Lincoln's conception of "free labor" was Lockean and grounded in the view that each person should have the right to enjoy the fruits of his or her own labor. For him, labor was an essential aspect of property rights. As he put it, albeit with more flourish, "I always thought the man that made the corn should eat the corn."

Any good antitrust lawyer will tell you the best part of our field is learning about product markets. From rocket parts to digital markets and everything in between, we get to learn about products and services that have a discernable impact on the daily lives of American consumers. During the 129 years of Sherman Act enforcement, and 105 years of Clayton Act enforcement, labor cases have comprised a smaller portion of our docket than enforcement actions involving tangible goods and services.

A labor market, like any other, is ripe for manipulation due to potential anticompetitive conduct and transactions. Accordingly, enforcer sand courts alike have reaffirmed that antitrust law seeks to preserve the free market opportunities of buyers and sellers of employment services. Indeed, the Antitrust Division has taken corporations to court in wage-fixing and no-poach agreements in order to give meaning to this fundamental proposition of law.

The idea that unlawful corporate power can harm both buyers and sellers rests in the foundation of U.S. antitrust law. In supporting the passage of the law that came to bear his name, Senator John Sherman of Ohio warned that monopoly power:

[C]an control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. [...] The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors.* Such a combination is far more dangerous than any heretofore invented, and . . . by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and *in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals.*²

The concept of employer collusion was not even a novel idea in 1890 when the Sherman Act was passed. More than 100 years earlier, Adam Smith observed:

We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. *Masters are always and everywhere in a*

² 21 Cong. Rec. 2457, (1890).

*sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual price.*³

That Adam Smith is simultaneously revered as the father of free-market economics and also someone who was concerned about the position of workers⁴ parallels another important point: sound competition enforcement and policy can help promote a competitive market place for both buyers and sellers of employment services.

In my view, Smith's observations and worldview offer a broader lesson to all of us: labor competition matters do not belong to the political left or the ideological right. They are not inherently pro-worker or pro-business. Labor issues, broadly speaking, are quite complex. While antitrust is not a panacea for every issue facing the American worker, we know that timely and effective antitrust enforcement can go a long way towards promoting robust competition in the marketplace for employment services. Such action is grounded in the rule of law, and faithful to Congress's intent.

Undoubtedly, the history of antitrust enforcement in labor markets has been uneven. While several early cases marshaled the antitrust laws against labor unions, in the modern era, enforcement has largely focused on mergers, information exchanges, and collusive agreements.

For example, in *United States v. Utah Society for Healthcare Human Resources Administration*, the Division sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current wage information about registered nurses. The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low. In 2007, the Division sued the Arizona Hospital and Healthcare Association, a trade group acting on behalf of Arizona hospitals, that used a registry program to fix certain terms and conditions about temporary nursing personnel. It also set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses.

Between 2010 and 2012, the Division sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and eBay for entering into unlawful no-poach agreements. Most recently, the Division sued two train equipment manufacturers, Knorr-Bremse and Wabtec, for entering into unlawful no-poach agreements.

With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge. Those cases make clear that the consumer welfare standard is

³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.viii.13 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776).

⁴ See, e.g., Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.x.c.61 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776) ("Whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. When the regulation, therefore, is in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the masters.").

flexible enough to take into account harm to competition that is localized in an upstream labor market, not just a downstream product market.

One labor competition topic that is not on today's workshop agenda is criminal enforcement. While we cannot comment on the status or the timing of our criminal no-poach and wage-fixing investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division. As former Attorney General Robert Jackson observed, justice is neither automatic nor blind.⁵ The success of the department in this initiative is not based on quantitative metrics, but on the qualitative performance of our investigative work. That is especially true in matters implicating an individual's liberty interest.

Today's workshop will explore thought-provoking issues and trends at the intersection of competition law and labor.

After a framing presentation about the economics of labor markets and key questions for the workshop, Dr. Ron Drennan, one of the Division's most talented economists, will moderate a discussion about approaches to defining labor markets. After a lunch break, guests will return for the afternoon session, which will open with remarks from Mr. Ramogi Huma of the National College Players Association. A former UCLA football player himself, he will talk about his experience advocating for college athletes, a fascinating and distinctive group of laborers, in antitrust cases and through policy proposals. After Mr. Huma's remarks, a truly stellar panel will discuss agreements affecting worker mobility in complex business settings, with special focus on franchises and the "gig" economy. After a short break, we will conclude the day's substantive programming with a panel about the statutory and non-statutory antitrust exemptions for collective bargaining and other labor union activity. That panel will feature outstanding panelists, including lawyers, a professor, and a senior official from the U.S. Department of Labor.

As you may know, today's workshop is the first in a two-part series that we are hosting in partnership with the Federal Trade Commission. The second day of the workshop will be hosted by the FTC and will focus on issues associated with the use of non-compete clauses in employment contracts. The workshop will examine the current state of economic research on the effects of non-compete clauses, and whether additional research would allow the agencies to better understand the short-term and long-term micro and macro effects of such clauses. We and the Commission will provide the date and agenda for the second workshop in an upcoming announcement.

Workshops like these give our agencies the opportunity to have a candid substantive dialogue with stakeholders and thought leaders to ensure that we have the benefit of their expertise and experience. They also help identify and incentivize areas for continuing research and study.

Again, I want to thank each of our panelists for your willingness to participate in this

⁵ Robert H. Jackson, *The Federal Prosecutor* (1941)), available at <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.

workshop and for the perspectives you bring. I look forward to the discussion.

With that, let me now introduce Professors Ioana Marinescu and Ellie Prager. Dr. Marinescu is a labor economist and a Professor in the School of Social Policy and Practice at the University of Pennsylvania. Her research expertise includes antitrust and workers, online job search, employment contracts, unemployment insurance, and policies designed to enhance employment, productivity, and economic security. She is also a faculty research fellow at the National Bureau of Economic Research. Dr. Prager is a Professor at the Kellogg School of Management at Northwestern University, where she teaches data analysis and economics. Her research focuses on predetermination, insurance plan design, and the drivers and effects of mergers in the health care sector. In 2018, she co-authored a significant paper that measured wage growth for workers following consolidation by examining a decade worth of hospital mergers. We could not have asked for better presenters to kick off our event. Thank you, Ioana and Ellie. I'll turn it over to you.